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May 1, 2003

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via Courier

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E., Suite 110
Washington, D.C. 20002

Re: WT Docket No. 02-196; APPLICATION FOR REVIEW

Dear Secretary Dortch:

On behalf of my client, i2way Corporation, I am filing the original and nine (9) copies of an Application for Review in the above-referenced proceeding.

If you should have any questions regarding this filing, kindly contact the undersigned.

Very truly yours,

Frederick J. Day

Frederick J. Day
Counsel for
i2way Corporation

Enclosure

No. of Copies rec'd 0+9
List ABCDE

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of:	)	
	)	
i2way Request for Declaratory Ruling	)	WT Docket No. 02-196
Regarding the Ten-Channel Limit	)	
of Section 90.187(e) of the Commission's Rules	)	
	)	
Hexagram Petition to Deny i2way	)	
Applications	)	

To: The Commission

APPLICATION FOR REVIEW

i2way Corporation ("i2way"), by its attorney and pursuant to Section 1.115 of the rules and regulations of the Federal Communications Commission ("FCC" or "Commission")[1], hereby files this Application for Review of the *Order* issued April 1, 2003 by the Wireless Telecommunications Bureau in the above-referenced proceeding.[2]

INTRODUCTION

The April 1st *Order* reached three decisions. *First*, it ruled that Section 90.187(e) restricts applicants to no more than one 10-channel application in the 150 MHz and 450 MHz frequency bands at a time throughout a single service area. *Second*, it returned to processing certain i2way

[1] 47 C.F.R. § 1.115 (2002).

[2] *Order* (DA 03-1044), WT Docket No. 02-196, adopted March 31, 2003, released April 1, 2003, ___ FCC Rcd. _____ (2003).

applications that were the subject of a staff mistake during the application review process. *Third*, it dismissed a petition to deny that Hexagram, Inc. had filed against certain i2way applications. By this Application for Review, i2way requests review, by the *en banc* Commission, of the first of the three decisions articulated in the *Order*.

BACKGROUND

i2way is in the process of deploying a highly efficient, dynamic, digital-based system for assigning frequency pairs to be used by two-way customers. When i2way's system is fully deployed, it will provide effective two-way communications in virtually all major urban areas of the country. To accommodate the deployment of its state-of-the-art digital system, i2way requires a complement of various types of radio facilities within the same metropolitan area and, for this reason, filed multiple applications for the same areas in many parts of the country. For example, with respect to the 450 MHz band, i2way simultaneously filed applications for more than one station in Los Angeles. The applications each proposed to establish transmitter sites at different locations within the Los Angeles metropolitan area. The sites were located dozens of miles from one another. All of the applications for the Los Angeles area, save for the first application filed, were returned or dismissed by the Commission for a perceived violation of the 10-channel limit.

ISSUE STATEMENT

In pertinent part, the rule at issue states:

> No more than 10 channels for trunked operation in the

> Industrial/Business Pool may be applied for in a single application. Subsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification, submitted to the certified frequency coordinator coordinating the application, that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation.

The issue posed in this Application for Review is: Whether the Wireless Telecommunications Bureau properly interpreted Section 90.187(e) when it determined that the rule section prohibits applicants from having more than one 10-channel application in the same service area pending at the same time.

ARGUMENTS

1. In Interpreting Section 90.187(e), The Commission Is Held To The Plain Meaning Of The Words That Form The Rule. It is axiomatic that, in any question of rule interpretation, the meaning of a rule should be gleaned from the actual words used in the rule. "The plain meaning of the language governs unless expressed intent is to the contrary or the plain meaning would lead to an absurd result."[3] In the same vein, the "(i)nterpretation should assume that words should be given their normal meaning."[4]

2. As Used In Section 90.187(e), The Word "Application" Refers To The Standard Form Which The Commission Requires Applicants To Use When Requesting Specific Frequencies At A Specific Site. Section 1.907 of the Commission's rules, which specifically governs the

[3] 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 134 (2nd ed. 1997).

[4] *Id.*

Wireless Telecommunications Services, defines an "application" as "(a) request on a standard form for a station license as defined in § 3(b) of the Communications Act, signed in accordance with § 1.917 of this part, or a similar request to amend a pending application or to modify or renew an authorization." Applying this definition to the first sentence of Section 90.187(e), it becomes clear that applicants are prohibited from specifying more than 10 channels on each standard form that is submitted as an application.

3. With Respect To The Prohibition Attached To "Subsequent Applications", The Words Used In Section 90.187(e) Lack Any Geographical Reference. The Bureau's *Order* suggests that the 10-channel limit contained in Section 90.187(e) applies to an entire service area. If allowed to stand, the *Order* would restrict an applicant to applying for a maximum of ten channels at a time within an entire market. The *Order* reaches this conclusion by "grafting" the 37/39 dbu contours referenced elsewhere in Section 90.187 onto the 10-channel restriction. There are, however, no words in Section 90.187(e) that expressly extend the 10-channel limit to a service area. The rule could be read just as easily, and in fact more easily, as limiting applicants to ten channels at a single transmitter location. At best, the rule is impermissibly vague.

4. As Currently Worded, Section 90.187(e) Is Inadequate To Accomplish The Wireless Bureau's Preferred Result. The *Order* concludes that "Section 90.187(e) limits single applications to ten channels at single locations." The *Order* then proceeds to define a "location" as the expanse of land encompassed within a service area. In support of this position, the *Order* argues that Section 90.187(b) delineates service area contours at 37 dbu and 39 dbu, respectively,

for each VHF and UHF station location. Therefore, the *Order* concludes, applicants are prohibited from maintaining more than one 10-channel application over their defined service area at the same time. Under this interpretation, if an applicant applied to operate a 10-channel station in downtown Los Angeles, the applicant would not be able to file another 10-channel application for any other site within the Los Angeles metropolitan area until the initial application was granted and the station placed in operation. The second application, even if for a site located dozens of miles away from the site specified in the first application, would be precluded because the proposed site fell within the service area of the first application. The plain words contained in Section 90.187(e) do not support such a restrictive result. There is a critical sentence that is lacking. If the rule had included a statement to the effect that "Applicants may have no more than one application pending in a geographic area at any time," i2way and other applicants would have had clear and unambiguous notice as to the scope of the restriction. As the rule is currently worded, however, the plain words fail to place applicants on notice that they will be prohibited from applying for more than ten channels *in a single service area.*

5. Based On The Plain Meaning Of Section 90.187(e), It Is Not Apparent How i2way's Applications Violated Section 90.187(e). None of the affected i2way applications requested more than 10 channels. None of the i2way applications that could be deemed "subsequent" for purposes of Section 90.187(e) sought to license 10 channels at the same site as specified in a previous i2way application. While Section 90.187(e) does contain a prohibition on the filing of "subsequent applications", it is not at all clear that the rule operates to preclude subsequent applications for any and all sites that are within the 39 dbu service contour of the initial station.

Nowhere does Section 90.187(e) even mention the terms "location" or "service area." The only term that can be relied upon for help in defining the scope of the restriction is "application." An objective reading of the rule would suggest that the prohibition on applying for more than 10 channels relates to a single application—and not to an entire service area.

6. The Interpretation Of Section 90.187(e) Set Forth In The *Order* Is Arbitrary And Capricious. In *Satellite Broadcasting Company, Inc. v. FCC*, the Court of Appeals examined a situation in which both the appellant, Satellite Broadcasting Company, and the Commission proffered conflicting interpretations of an application filing rule. In the Court's view, the interpretation offered by the Commission was reasonable. At the same time, however, the Court found that the interpretation advanced by Satellite Broadcasting Company was reasonable as well. Even though the Commission's interpretation was reasonable on its face, the Court ruled in favor of Satellite Broadcasting. It did so because, if the Court had decided in favor of the Commission, the effect would have been to "punish a member of the regulated class for reasonably interpreting Commission rules." The Court concluded that "[t]he agency's interpretation is entitled to deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation." "Otherwise," the Court stated, "the practice of administrative law would come to resemble 'Russian Roulette.' " [5] To avoid such a result, the Court was compelled to vacate the agency decision of which Satellite Broadcasting Company had complained. Under the circumstances, the Court declared, the decision was "arbitrary and capricious." Similar logic applies in the instant case. If the Commission wishes to rely on the

[5] *Satellite Broadcasting Company, Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987).

interpretation of Section 90.187(e) set forth in the *Order*, it must give full notice of its interpretation—before the applications are filed. Otherwise, the Commission has placed i2way in exactly the same posture as Satellite Broadcasting Company. The interpretation advanced in the *Order* punishes i2way for reasonably concluding that Section 90.187(e) permitted the filing of more than one 10-channel application within the same geographic area. *Satellite Broadcasting Company* obligates the Commission to provide clear notice of its rules before using those rules to dismiss applications.[6] If the interpretation of Section 90.187(e) set forth in the *Order* is allowed to stand, the Commission will have failed in that obligation.

CONCLUSION

The current FCC interpretation of Section 90.187(e) is contrary to the actual words and content of the rule. If the Commission's interpretation is allowed to stand, extreme hardship will be visited upon i2way Corporation, and vast sums of money expended in reliance on the rules will be wasted.

Respectfully submitted,

i2way Corporation

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May 1, 2003

[6] *Id.*